84-1847 (1)

Number _____

Office-Supreme Court, U.S.
FILED
MAY 25 1985
ALEXANDER L. STEVAS,
CLERK

to

The Supreme Court of the United States

OCTOBER TERM 1984

Burton R. Landes, Petitioner,

vs.

Department of Justice, Respondent.

On Appeal from the United States Circuit Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

TO BE SERVED UPON:

Mr. Edwin Meese, The Attorney General of the United States. Constitution Avenue and Tenth Street, N. W., Washington, D.C. 20530.
Telephone: (202)-633-2000

Mr. Rex E. Lee, The Solicitor General of the United States, Constitution Avenue and Tenth Street, N. W., Washington, D.C. 20530.
Telephone: (202)-633-2000

Burton R. Landes, Petitioner, Party of Record,
11 College Avenue, Trappe, Pennsylvania 19426.
Telephone: (215) 489-2908

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The TABLE OF CONTENTS, CITATIONS, STATUTES (page 2) may follow list of parties (page 4).

A STATEMENT OF THE CASE (page 5) may precede ARGUMENT (page 11).

The questions presented for review are:

(1) Did the Department of Justice's, FBI Special Agent Michael M. Roman's deniability declaration (demonstrably false) of having a file on Sarah Churchill, daughter of Sir Winston and Lady Clementine, mislead Judge Thomas A. Flannery to a dismissal order in its pose of stupidity, restraint of trade, or as an outright lie? Or in space-time, all three?

(2) In the light of one, two, or all three, should not the disputed documents be reviewed *in camera, de novo* in the United States District Court for the District of Columbia under *Title 5 United States Code 552(a)(4)(B) and as affirmed by subsequent court causes, particularly the late *McGehee v. C. I. A.*, 697 F. 2d 1095 (1983)?

*Title 5, United States Code, Section 552(a)(4)(B) reads:

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

Edwin Meese may be added to the parties to the proceedings as the present Attorney General: (Burton R. Landes versus)

Department of Justice:

William French Smith, United States Attorney General, Defendant...;

Edwin Meese, successor, Respondent;

William H. Webster, Director FBI, Defendant, Respondent;

James K. Hall, Chief, Freedom of Information Privacy Acts Section, Records Management Division, FBI, Defendant, Respondent;

Michael M. Roman, Special Agent FBI, Intervenor-Defendant, Respondent;

AMERICAN HISTORICAL ASSOCIATION - Recusant in effected support of Defendant, Respondent;

Ronald R. Landes, Brother, Recusant - neutral not wishing to be citizen process server;

Winifred Landes Faust, Sister, Recusant - neutral not wishing to be citizen process server.

A list of official and unofficial orders delivered in the administrative agencies of the courts below: (1) James K. Hall to petitioner - (after latter's request) RE: *The Sarah Churchill File Request No. 239366* "...search of the indices to our records will be made...processed..." -dated July 25, 1983. There were months without further actions on *Request No. 239366...* (2) *Complaint;* Appearance -December 5, 1983, following include motions of parties and returns of service of plaintiffs on defendants from -December 5, 1983 through March 15, 1984. There was an answer of defendants to the complaint on -March 19, 1984. A status hearing was scheduled for -May 29, 1984. There were various motions for summary judgment, dismissal and delay. There was the dismissal order of Thomas A. Flannery, J., -August 28, 1984. Then the appeal process as detailed below in a statement of this cause.

A STATEMENT OF THE CASE:

Burton R. Landes is a writer and publisher, self-employed working from his home at 11 College Avenue, Trappe, Pennsylvania, 19426. Though further confirmation and footnoting of facts, opinions and conclusions had been deemed professionally desirable, it was not mandatory and so, for reasons which may become clear as this writing unfolds, the *Study/Sarah Churchill* is now in its 5th edition and on sale.

The petitioner, above-described in part, is an honorably discharged veteran of the United States Coast Guard Reserve (Honorable Medical, 1945, see below) and as an historian, as well as good citizen, requested a search for the file of Sarah Churchill, daughter of Sir Winston and Lady Clementine, under the Freedom of Information Act, as enacted into Public Law 80-554, September 6, 1966, 80 Stat. 383 and as amended and interpreted by the Executive and the Judiciary. There would not be compliance or explanation within the prescribed ten days. The petitioner sued for compliance. The course of proceedings is as transcribed as follows:

USDC DISTRICT OF COLUMBIA PROCEEDINGS

Date	
1983	
Dec. 5	COMPLAINT; Appearance. (io)
Dec. 5	SUMMONS (3) issued. (io)
Dec. 28	MOTION of Burton R. Landes for leave of American Historical Association to file an amicus curiae; Exhibit (Copy of Letter to Mr. Landes from Jamil S. Zainaldin). (io)
Dec. 28	MOTION of plaintiff for leave to file letter of refusal to serve summons and complaint on U.S. Attorney (District of Columbia); Exhibit (Copy of Letter). (io)
Dec. 28	MOTION of plaintiff for leave to file letter of refusal to serve summons and complaint on James K. Hall, Chief, Freedom of Information Privacy Acts Section, Records Management Division, Washington, D.C. 20535;
1984	Exhibit (Copy of Letter). (io)
Feb. 17	RETURN ON SERVICE upon the U.S. Attorney on Feb. 16, 1984, by hand. (dc)
Feb. 22	AFFIDAVIT OF SERVICE upon deft James Hall on Feb. 21, 1984. (io)
Feb. 22	AFFIDAVIT OF SERVICE upon deft U.S. Attorney General on Feb. 21, 1984. (io)
Mar. 15	AFFIDAVIT OF SERVICE upon U.S. Attorney on Feb. 16, 1984. (io)
Mar. 19	ANSWER of defts to the complaint.
Mar. 19	CALENDARED. C/D (N)
Mar. 20	STATUS HEARING AGENDA-ED FOR MAY 29, 1984.
Mar. 23	PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.
May 2	DEFENDANTS' MOTION FOR ENLARGEMENT OF TIME *nunc pro tunc.*

May 18 DEFENDANTS' MOTION TO DISMISS.

May 29 PLAINTIFF'S MOTION FOR DELAY - As Status Hearing Postponed.

June 23 PLAINTIFF'S 'RESTRAINT OF COMPETITION' *et al.* Letter to Att. Van Berg.

July 2 PLAINTIFF'S LETTER 'FIRST RIGHTS TO SARAH CHURCHILL'S FILE,' *et al.* To Defendants' Counsel Joan S. Van Berg.

Aug. 28 MEMORANDUM AND DISMISSAL ORDER Of Thomas A. Flannery, J.

Aug. 29 PLAINTIFF'S *NOTICE OF APPEAL.*

[Docket USCCA District of Columbia]

Sept. 14 Copy of Pro Se Notice of Appeal and Docket Entries from Clerk, DC (n-2)

Sept. 14 Docketing Statement was mailed to Appelant

Sept. 14 Docketing Fee was paid in The District Court on Sept. 4, 1984.

Sept. 20 4-Appellant's Docketing Statement (m-17).

Sept. 25 Clerk's Order that a Briefing Schedule is set as follows: Appellant(s) Brief and Appendix— 12/03/84; Appellee(s) Brief— 01/02/85; Appellant(s) Reply Brief— 01/16/85. The Clerk shall include this case in the pool of cases available for selection on this Court's March, 1985 Calendar

Oct. 1 15-Appellant's Brief (m-24)

Oct. 1 7-Joint Appendix (m-24)

Nov. 15 4-Appellees' Motion for Summary Affirmance (m-15)

Nov. 26 4-Appellant's Response to Appellees Motion for Summary Affirmance (m-17)

Dec. 3 *Joan S. Van Berg/oz/ozn/B. R. Landes* (Letter)

Dec. 18 MOTION FOR CHANGE OF APPELLEES' PARTY NAMES TO NAME DEPARTMENT OF JUSTICE.

Dec. 21 APPELLEES' MOTION FOR AN EXTENSION OF TIME

Dec. 27 ANSWER To Appellees' Motion For An Extension Of Time

1985

Jan. 23 APPELLEES' MOTION FOR SUMMARY AFFIRMANCE GRANTED

Jan. 26 PETITION FOR RE-HEARING (Filed 1-29-85)

Feb. 19 PETITION FOR RE-HEARING DENIED BEFORE: WRIGHT, MIKVA & BORK

Feb. 21 NOTICE OF APPEAL as noted by ROBERT A. BONNER, Chief Deputy Clerk on Date Feb. 27, 1985.

The basis for federal jurisdiction in the United States District Court for the District of Columbia is founded on Title 5, United States Code, Section 552(a)(4)(B) as heretofore transcribed.

The jurisdiction of the Supreme Court of the United States is invoked:

(i) APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE GRANTED -January 23, 1985

(ii) PETITION FOR RE-HEARING DENIED BEFORE: WRIGHT, MIKVA & BORK -February 19, 1985

(iii) ... (INAPPLICABLE) ...

(iv) Statutory Provisions Rule 17(.2),*

* When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and unusual course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Statutes and Regulations which the case involves, in addition to Title 5 USC 552(a)(4)(B) as transcribed as a footnote on page one and Rule 17(.2.) of Title 28, APPENDIX — *Rules Of The Supreme Court*, are -

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

Title 50 USC 4-301 which reads: *

Sec. 4.3 *Access by Historical Researchers and Former Presidential Appointees.*

(a) The requirement in Section 4.1(a) that access to classified information may be granted only as is essential to the accomplishment of authorized and lawful Government purposes may be waived as provided in Section 4.3(b) for persons who:

(1) are engaged in historical research projects, or

(2) previously have occupied policy-making positions to which they were appointed by the President.

(b) Waivers under Section 4.3(a) may be granted only if the originating agency:

(1) determines in writing that access is consistent with with the interest of national security;

(2) takes appropriate steps to protect classified information from unauthorized disclosure or compromise, and ensures that the information is safeguarded in a manner consistent with this Order; and

* Federal Register/Vol. 47, No. 66/Tuesday, April 6, 1982/Presidential Documents, page 14881.

(3) limits the access granted to former presidential appointees to items that the person originated, reviewed, signed, or received while serving as a presidential appointee.

ARGUMENT

The reasons the writ should be allowed are spelled out in the United States Court of Appeals for the District of Columbia' Circuit's own decision, though by a different panel of judges - Judge Bork in the minority in the *McGehee v. C.I.A.*, 697 F.2d 1095 (1983) on both panels, however. Point by point analysis to synthesis was recorded in the petitioner's request for a re-hearing which was denied on February 19, 1985 by Judges Wright, Mikva and Bork. Rule 17(.2.) encompasses the particulars argued below in the six points delineated by the court in *McGehee v. C. I. A.*, as above. The crucial documents are the Roman Declaration (petitioner's copy wanting in outline and in chronology of events). It's validity was sworn to by its author, nonetheless, *under penalty of perjury.*

The petitioner particularly points out and the following documents as he understands:

No. 190-4251-2 has markings, in addition to "R/A" one "Roman 8-2/83" - "F B I" - "d/w" Circled - "wjg FOIA." Below, left, there is the hand-stamp "67 FEB 21 1984." There is also a hand-stamp "17 JAN 23 1984 ." FOIA follows one "wjg ." Below left, under "239366 (Requester's Number)" and "J. W."

No. 190-42541-4 has appended the Sarah Churchill index and the letter enclosure from the requester is dated September 7, 1983. Markings include "P/A" - "R/A" whatever "Roman 9-12-83" - "ack 11-28-83 wjg" and "wjg FOIA ." There is the circled "d/w" (?) The date stamp "17 JAN 23 1984" appears - also - "DE-108" (hand-stamp). There are initials bottom left "RM" - "SM" separated by

6958. Above Request No. 239366, *The Sarah Churchill File* are the letters "NO LOC" not initialed or dated. There appears a second "d/w" (?) At this point in time there can be no doubt that the Sarah Churchill file requested is that of Sarah Churchill, daughter of Lady Clementine and Winston Spencer Churchill.

No. 190-42541-6 contains the crucial "**Documents Have Been Located Which May Pertain To Your Request .**" In the upper left hand corner is the now familiar "P/A" (or R/A?). The faint initials "wfs" (?) seem to be crossed out. A "6" appears to the right of the slanted line. Dated November 28, 1983 , mailed by the FBI on the same date, EXEC AD-LES "wjg" appear on the stamp added by "57 FEB 21 1984." The writer(s) of the letter are noted as WJG:avs/lal. It is signed by James K. Hall, Chief, Freedom of Information Privacy Acts Section Records Management Division. There is a stamp "MAIL ROOM" and a checkmark JHK, and below the surname *Roman* (Michael Roman of the Roman declaration?). There is another stamp date "17 JAN 23 1984." An evidentiary initial/initials is scrawled out.

CONCLUSION

The petitioner appeals to this honorable Court to remand this cause to the District of Columbia for *in camera* inspect of the anonymous and "pedestrian" - "prosaic" daughter of whom? Further, the petitioner would be guaranteed first rights in electic portions of any future reveal of the file of Sarah Churchill, daughter of Sir Winston Churchill. *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 100 S.Ct. 960 (1980) and *Forsham v. Harris*, 445 U.S. 156 (1980), along with those justices not taking part in the former, would suggest that at least 6 justices of the United States Supreme Court may see it appellant's way. The petitioner quotes from Justice Rehnquist, writer of the majority opinion in *Kissinger v. Reporters Committee for Freedom of the Press*, hereincited, "Under 5 USC Section 552(a)(4)(B) federal jurisdiction is dependent upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records.' " Judicial authority to devise remedies and enjoin agencies can only be invoked, under the jurisdictional grant conferred by Section 552, if the agency has contravened all three components of this obligation." [-SEE *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 153-154.]

Burton R. Landes, Petitioner, *Pro Se*,
11 College Avenue,
Trappe, Pennsylvania 19426.
Telephone: (215) 489-2908

84-1847

Office-Supreme Court, U.S.
FILED
MAY 25 1985
ALEXANDER L. STEVAS,
CLERK

Number _____

to

The Supreme Court of the United States

OCTOBER TERM 1984

Burton R. Landes, Petitioner

vs.

Department of Justice, Respondent

APPENDIX

to

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPENDIX INDEX

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Order of the United States Circuit Court of Appeals for the District of Columbia Circuit dismissing petition for rehearing in appellant's request for determination of the matter *de novo* dated February 19, 1985 ..... A-2

Order of United States Circuit Court of Appeals for the District of Columbia Circuit for Summary Affirmance dated January 23, 1985 ..... A-3

Order of the United States Circuit Court of Appeals for the District of Columbia Circuit for briefing schedule dated September 25, 1985 ..... A-4

Memorandum accompanying Order of Dismissal dated 28 August 1984 ..... A-6

Order of the United States District Court for the District of Columbia dismissing cause dated 28 August 1984 ..... A-9

The Sarah Churchill File Request response numbered 239366 and dated July 25, 1983 ..... A-10

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5635

September Term, 1984

February 19, 1985

BURTON R. LANDES

v.

DEPARTMENT OF JUSTICE

Before: Wright, Mikva and Bork, Circuit Judges

ORDER

On consideration of appellant's petition for rehearing, filed January 29, 1985, it is

ORDERED, by the Court, that the aforesaid petition is denied.

FILED this 19th day of February, 1985.

FOR THE COURT, George A. Fisher, Clerk

/s/ ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5635

September Term, 1984

C.A. No. 83-03615

January 23, 1985

BURTON R. LANDES
Appellant

v.

WILLIAM FRENCH SMITH
U.S. Attorney General, *et al.*

Before: Wright, Mikva and Bork, Circuit Judges

ORDER

Upon consideration of appellees' motion for summary affirmance, and the response thereto, it is

ORDERED by the court that appellees' motion is granted. The district court properly dismissed appellant's complaint because the target agency had no responsive documents. *See* 5 U.S.C. § 552(a)(4)(B); *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150 (1980). It is

FURTHER ORDERED by the court, on its own motion, that the Clerk is directed to withhold issuance of this court's mandate until seven (7) days after disposition of any timely filed petition for rehearing.

Per Curiam

FILED January 23, 1985 GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5635

September Term, 1984

DC Civil No. 83-03615
September 25, 1984

BURTON R. LANDES
Appellant

v.

WILLIAM FRENCH SMITH
U.S.Attorney General, *et al.*

ORDER

This matter having been docketed on September 14, 1984 and the docketing statement having been filed, it is

ORDERED that a briefing schedule is set as follows:

Appellant(s) brief and appendix (or record excerpts or General Rule 17(c) transcripts)	December 3, 1984,
Appellee(s) brief	January 2, 1985,
Appellant(s) reply brief, if any	January 16, 1985.

Based upon the foregoing briefing schedule, the Clerk shall include this case in the pool of cases that are available for selection on this Court's March, 1985 calendar.

FILED this 25th day of September, 1984.

FOR THE COURT: George A. Fisher, Clerk

/s/ PATRICIA L. CHATMAN
Deputy Clerk

Form Order #1
(Feb., 1984)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3615

August 28, 1984

BURTON R. LANDES
Plaintiff

v.

WILLIAM FRENCH SMITH
et al., Defendants

MEMORANDUM

This matter came before the Court on defendants' motion to dismiss for lack of subject matter jurisdiction. For the reasons stated herein, defendants' motion is granted.

Plaintiff seeks, through the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, to compel the release of all records maintained by the Federal Bureau of Investigation ("FBI") pertaining to the "Sarah Churchill File." [1]

1 Plaintiff actually sues two agency officials, and seeks to add a third. Even if this Court had jurisdiction to compel the agency to produce the requested documents, which it does not for the reasons discussed below, it clearly has no jurisdiction over the individuals actually named as defendants. FOIA provides only that the courts have jurisdiction to compel *agency* disclosure of improperly withheld documents, 5 U.S.C. §552-(a)(4)(B), and federal government officials sued in their official capacity are not proper party defendants in an FOIA action. *Canadian Javelin, Ltd. v. Securities & Exchange Commission*, 501 F. Supp. 898, 904 (D.D.C. 1980).

FBI Special Agent Michael Roman has filed an affidavit outlining plaintiff's administrative efforts and stating the FBI's conclusion that the agency does not have any documents responsive to plaintiff's request. The Roman Affidavit describes the FBI's attempts to clarify plaintiff's request through personal communication with plaintiff, and states that once the FBI understood that plaintiff wanted FBI files pertaining to Sarah Churchill, the deceased daughter of Winston Churchill, it conducted a thorough search of its files and concluded that it had no responsive documents. Plaintiff exhausted his administrative appeals, and files this action *pro se* seeking *in camera* review of the requested documents and release of all responsive documents.[2]

Defendants argue that this Court lacks subject matter jurisdiction because plaintiff seeks access to records that defendant FBI simply does not have. The Court Agrees. A district court has no jurisdiction in an FOIA case if the target agency has no responsive documents in its possession, since the statute only confers jurisdiction to determine if documents have been "improperly withheld," and an agency cannot "improperly withhold" documents it does not have. 5 U.S.C. § 552(a)(4)(B);

2 It should be noted that plaintiff also filed a "Motion for Summary Judgment" and a letter dated April 23, 1984 in which he requested that the Court review the "Churchill file" *in camera*. Given the FBI's declaration that it has no responsive documents, the Court finds such *in camera* review unnecessary, if not impossible. Because the Court has no jurisdiction, as explained below, plaintiff's summary judgment motion and attorney fee request need not be reached.

Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 150, 100 S. Ct. 960, 968 (1980); *Marks v. Department of Justice*, 578 F.2d 261, 263 (9th Cir. 1978). In this case, although the FBI originally indicated that it "may" have responsive documents, *see* Roman Affidavit ¶9(G); Exhibit G, after plaintiff clarified the subject matter of his request and the FBI conducted a thorough search for documents responsive to his refind request, it was determined that the FBI had no such documents. Roman Affidavit ¶¶9(K)-(M), 13-15. Plaintiff has not alleged agency bad faith, and the Court sees no reason to question the agency's representation that it has no responsive documents, *see Hayden v. National Security Agency*, 608 F.2d 1381, 1387 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980). The Court has no jurisdiction, and this case must be dismissed.

An appropriate Order accompanies this Memorandum.

/s/ THOMAS A. FLANNERY
United States District Judge

SIGNED this 28th day of August, 1984.

NO. 84-5635
ATTACHMENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3615

August 28, 1984

BURTON R. LANDES
Plaintiff

v.

WILLIAM FRENCH SMITH
et al., Defendants

ORDER

This matter came before the Court on defendant's motion to dismiss. For the reasons stated in an accompanying Memorandum, after careful consideration of defendant's motion and the entire record in this case, it is, by the Court, this 28th day of August, 1984,

ORDERED, that defendant's motion to dismiss is granted; and it is further

ORDERED, that this case be, and hereby is, dismissed.

FILED August 28, 1984

James F. Davey, Clerk

/s/ THOMAS A. FLANNERY
United States District Judge

Request No. 239366

Subject
THE SARAH CHURCHILL FILE

MR. BURTON R. LANDES
11 COLLEGE AVENUE
TRAPPE, PA 19426

July 25, 1983

Dear Requester:

This is to acknowledge receipt by FBI Headquarters of your recent Freedom of Information-Privacy Acts (FOIPA) request and to advise you we will comply with your request according to Title 5, United States Code, Section 552(a)(6)(A)(i) and other Federal statutes and regulations. Additional information, if needed, will be requested by separate letter.

A search of the indices to our records will be made to determine if we have the information you seek. If the search fails to locate record(s) pertaining to your request, you will be notified. If the search locates a record(s) which may be responsive to your request, it will be retrieved and processed according to the provisions of the FOIPA.

Your request has been assigned the number indicated above. Please use this number in all correspondence with us.

Chief /s/ James K. Hall
Freedom of Information-
Privacy Acts Section
Records Management Division